Shanmugam a/l Munusamy v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO B-05-97 OF 1995
SHAIK DAUD, ABDUL MALEK AHMAD AND MOKHTAR SIDIN JJCA
30 OCTOBER 1998

Evidence *— Corroboration — Child giving unsworn evidence — Trial judge warned jury of risks of accepting child's evidence — Jury warned that appellant cannot be convicted on uncorroborated evidence of child witness — Whether judge's summing-up was fair and in accordance with evidence — Whether there was sufficient corroboration of evidence*

Evidence *— Judge — Direction to jury — Appellant convicted of murder — Defence of denial — No other defence tendered — Failure to direct jury on lesser charge or exceptions — Whether failure by judge was a misdirection*

Criminal Procedure *— Trial — Close of prosecution's case — Trial judge said prima facie case established against appellant — If unrebutted would warrant conviction — Whether prosecution had actually proved case beyond reasonable doubt*

The appellant was convicted by the High Court for murder under s 300 of the Penal Code (FMS Cap 45) ('the Code') and was sentenced to death under s 302. The trial of the appellant was conducted before a panel of jurors and at the end of the trial, the jury found the appellant guilty. The appellant appealed against his conviction and sentence.

Counsel for the appellant submitted that there was a misdirection by the trial judge in respect of the evidence of a child witness ('SP9'), as there was no warning by the judge in his summing-up to the jury of the risk of a conviction based on a child's evidence. Further, it was conceded that the trial judge had directed the jury correctly when he said there was no direct corroborative evidence in respect of SP9's evidence. However, the complaint of the appellant was that when the trial judge made the direction, he pointed out the circumstantial evidence of four witnesses which he said were corroborative evidence of SP9. Counsel for the appellant submitted that the cumulative effect of evidence of the four witnesses were not sufficient for corroboration and as such, the judge should have given another warning of the risk of accepting SP9's evidence. Counsel for the appellant also submitted there was a misdirection by the trial judge when he failed to direct the jury on the lesser charge of culpable homicide under s 304 of the Code. The last issue was whether the trial judge had erred when at the end of the prosecution's case, he found that there was a prima facie case against the appellant which if unrebutted would warrant his conviction.

Held, dismissing the appeal and confirming the conviction and sentence:

(1) The trial judge had warned the jury of the risks of accepting a child's evidence and that they had to evaluate and scrutinize the evidence when it was not given under oath. The jury was also warned that a child may find difficulty in differentiating between 'fantasy' and 'reality' and also between 'imagination' and 'what actually was seen'. Further, the trial judge had made it clear to the jury that an accused person cannot be convicted on uncorroborated evidence of a child witness. He also explained to the jury that corroboration did not necessarily come from the evidence of another eyewitness, but could also come from 'circumstantial evidence' of other witnesses. The circumstantial evidence must be of such a nature that it would lead to an irresistible conclusion that the facts did happen. As such, the trial judge's summing-up was fair and in accordance with the evidence adduced (see pp 296C–D, 297H–I and 300C–D).

(2) There was sufficient corroboration of SP9's evidence on material particulars which the trial judge stated in his summing-up. The trial judge had also warned the jury of the risks in evaluating these corroborative evidence, and that it was only for them to decide from what they had seen and heard from the witnesses and not to be influenced by what he had said (see p 300H).

(3) The evidence led by the prosecution was under s 300 of the Code and the appellant's defence was one of denial. There was no suggestion that at the time of the incident, he was drunk. As such, there was no duty on the part of the trial judge to sum up to the jury in respect of a lesser charge. His failure to address the issue of a lesser offence or that the exceptions to s 300 applied was not a misdirection because no such defence or evidence was made available or suggested (see p 301F–I).

(4) There was evidence to show that at the end of the prosecution case, the prosecution had proved its case beyond reasonable doubt. The choice of the words 'prima facie' was only the wrong usage of words. When the trial judge said that there was a prima facie case against the appellant that if unrebutted would render a conviction, he meant them to be that the prosecution had proved its case beyond reasonable doubt (see p 302A–B).

[Bahasa Malaysia summary

Perayu telah disabitkan oleh Mahkamah Tinggi untuk kesalahan membunuh di bawah s 300 Kanun Keseksaan (NMB Bab 45) ('Kanun tersebut') dan telah dijatuhan hukuman mati di bawah s 302. Perbicaraan perayu telah dijalankan di hadapan satu panel juri dan pada penghujung perbicaraan tersebut, juri mendapati perayu bersalah. Perayu telah merayu terhadap sabitan dan hukuman yang telah dijatuhkan.

Peguam perayu berhujah bahawa terdapatnya penyalaharahan oleh hakim perbicaraan berhubung dengan keterangan seorang saksi kanak-kanak ('SP9') kerana tidak terdapat sebarang amaran oleh hakim tersebut dalam kesimpulannya kepada juri mengenai risiko sabitan berdasarkan keterangan seorang kanak-kanak. Selanjutnya, adalah diakui bahawa hakim perbicaraan telah mengarahkan juri dengan betul ketika beliau mengatakan bahawa tidak terdapat keterangan menyokong secara langsung berhubung dengan keterangan SP9. Walau bagaimanapun, aduan perayu adalah bahawa ketika hakim perbicaraan membuat arahan, beliau telah menegaskan keterangan mengikut keadaan empat saksi yang mana beliau mengatakan adalah keterangan menyokong SP9. Peguam perayu berhujah bahawa kesan secara kumulatif akan keterangan keempat-empat saksi tersebut tidak memadai untuk menyokong dan oleh yang demikian, hakim seharusnya memberikan satu lagi amaran mengenai risiko menerima keterangan SP9. Peguam perayu juga berhujah bahawa terdapatnya penyalaharahan oleh hakim perbicaraan apabila beliau gagal mengarahkan juri atas pertuduhan homisid salah yang lebih ringan di bawah s 304 Kanun tersebut. Isu terakhir adalah sama ada hakim perbicaraan terkhilaf apabila pada penghujung kes pendakwaan, beliau mendapati bahawa terdapatnya kes prima facie terhadap perayu yang mana jika tidak dipatahkan akan mewajarkan sabitannya.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Hakim perbicaraan telah memberi amaran kepada pihak juri mengenai risiko menerima keterangan kanak-kanak dan bahawa mereka haruslah menilai serta meneliti keterangan apabila ia tidak diberikan di bawah sumpah. Juri juga telah diberi amaran bahawa seorang kanak-kanak mungkin akan menghadapi kesukaran dalam memperbezakan antara 'fantasi' dan 'realiti' dan juga antara 'khayalan' dan 'apa sebenarnya yang telah dilihat'. Selanjutnya, hakim perbicaraan telah menyatakan dengan jelasnya kepada juri bahawa seseorang tertuduh tidak boleh disabitkan atas keterangan saksi kanak-kanak yang tidak disokong. Beliau juga menerangkan kepada juri bahawa sokongan tidak semestinya datang daripada seorang saksi yang lain, tetapi mungkin boleh juga datang daripada 'keterangan mengikut keadaan' saksi yang lain. Keterangan mengikut keadaan itu seharusnya mempunyai sifat yang akan membawa kepada kesimpulan yang tidak dapat dielakkan bahawa fakta-fakta itu memang telah berlaku. Oleh yang demikian, kesimpulan hakim perbicaraan adalah adil dan menurut keterangan yang dikemukakan (lihat ms 296C–D, 297H–I dan 300C–D).

(2) Terdapat sokongan yang secukupnya terhadap keterangan SP9 mengenai butir-butir penting yang telah dinyatakan oleh hakim perbicaraan dalam kesimpulannya. Hakim perbicaraan telah juga

memberi amaran kepada juri mengenai risiko menilai keterangan menyokong ini, dan bahawa ianya adalah hanya untuk mereka memutuskan daripada apa yang dilihat atau didengar daripada saksi-saksi dan tidak dipengaruhi oleh apa yang telah beliau perkatakan (lihat ms 300H).

(3) Keterangan yang dikemukakan oleh pihak pendakwaan adalah di bawah s 300 Kanun tersebut dan pembelaan perayu adalah penafian. Tiada saranan bahawa pada waktu peristiwa itu, ia dalam keadaan mabuk. Oleh itu, tiada kewajipan pada pihak hakim perbicaraan untuk membuat kesimpulan kepada juri berhubung dengan pertuduhan yang lebih ringan. Kegagalan beliau mengemukakan isu kesalahan yang lebih ringan atau bahawa kekecualian kepada s 300 terpakai bukannya satu penyalaharahan kerana tiada pembelaan atau keterangan sedemikian tersedia atau disarankan (lihat ms 301F–I).

(4) Terdapat keterangan bagi menunjukkan bahawa di penghujung kes pihak pendakwaan, pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah. Pilihan perkataan-perkataan 'prima facie' cumalah penggunaan perkataan yang salah. Apabila hakim perbicaraan mengatakan bahawa terdapatnya kes prima facie terhadap perayu yang mana jika tidak dipatahkan akan membentuk satu sabitan, maksud beliau ialah pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah (lihat ms 302A–B).]

Notes

For cases on child giving unsworn evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 561–563.

For a case direction to jury, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1153.

For cases on close of prosecution's case, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2899–2915.

Cases referred to

Attan bin Abdul Gani v PP [1970] 2 MLJ 143 (refd)
Juraimi bin Husin v PP [1998] 1 MLJ 537 (refd)
Lejzor Teper v R [1952] AC 480 (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174 (refd)
Yap Ee Kong & Anor v PP [1981] 1 MLJ 144 (refd)

Legislation referred to

Penal Code (FMS Cap 45) ss 300, 302, 304

Appeal from: Criminal Trial No 45–4 of 1993 (High Court, Shah Alam)

Siew Kuan Onn (*Peter Siew & Co*) for the appellant. A
Abang Iskandar (Deputy Public Prosecutor) for the respondent.

Mokhtar Sidin JCA (delivering judgment of the court): The appellant, Shanmugam a/l Munusamy, was convicted by the High Court, Shah Alam, Selangor under s 300 of the Penal Code (FMS Cap 45) ('the Code') and was sentenced to death under s 302 of the Code. The trial of the appellant B was conducted before a panel of jurors and at the end of the trial, by a unanimous decision, the jury found the appellant guilty of the offence of murder under s 300 of the Code. Based on that verdict, the learned trial judge proceeded to sentence the appellant under s 302 of the Code. Against that decision, the appellant appealed to this court.

C

The facts as enumerated by the learned trial judge in his submission to the jury are as follows.

On the day of the incident, at about midnight in the hall of their house, the appellant asked the deceased (his wife) for some money. The deceased refused to give the money. As a result of that, a quarrel ensued between D them. The appellant then left the hall and went to the back portion of the house. He reappeared in the hall carrying a sickle. He then slashed the deceased with the sickle three times on the head. When this happened, the appellant and the deceased were standing facing each other. The deceased fell to the floor after she was slashed. While the deceased was lying on the floor, the appellant took up a mop and hit the deceased's legs and waist E three times. This was witnessed by their daughter, Primadevi a/p Shanmugam ('SP9'). At the time of the incident, she was only nine years of age and at the time she testified in court, she was 12 years of age. For all intents and purposes, she was a child witness. According to her, after the appellant hit the deceased with the mop, the appellant carried the deceased out of the house and placed her on the railway tracks near the house. After F placing the deceased on the rail tracks, the appellant returned to the house and slept in the hall. SP9 was able to see all these through holes in the walls of her room.

When the appellant was asleep, SP9 went to the deceased who was lying on the rail tracks. At that time, the deceased was still alive and SP9 saw G injuries on her head and legs. The deceased was naked and was not able to get up. According to SP9, the deceased then asked SP9 to call her brother by the name of Segar. SP9 then went to wake up Segar and told him that the deceased was on the railway tracks. Segar went to the railway tracks where the deceased was and returned. He told SP9 that he could not find the deceased on the railway tracks and he went on to sleep. SP9 then woke H up her two younger sisters and went to the railway tracks where the deceased was lying. One of them returned to the house and told SP9 that the deceased wanted some water. SP9 then woke up the appellant and told him of the deceased lying on the railway tracks The appellant then told SP9 to tell the deceased to return to the house by herself. SP9 told the appellant I that the deceased was unable to walk. After that, the appellant went and picked up the deceased and carried her to the house and placed her in the

A hall. The appellant then asked his children to call their grandmother by the name of Poovaie a/p Kulandaivelu ('SP10'). SP9 together with Segar and another sister went to call SP10. After seeing the condition of the deceased, SP10 asked SP9 to call her uncle by the name of Arumugam a/l Palaniandy ('SP11'). SP11 then went to see the deceased.

B SP10, the mother of the deceased, gave evidence that in the morning of the day of incident, she went to the deceased's house after she was called by SP9. She found that the house was in total disorder and found some blood stains on the floor. The appellant was drunk. SP11, the brother of the deceased, gave evidence that he was informed of the incident at about 2am. He went to the deceased's house in a car. When he reached the house, he C found the deceased in serious condition. The appellant was in the hall and looking angry. SP11, with the help of the appellant, carried the deceased into the car and then together with Segar, took the deceased to Hospital Besar Tengku Ampuan Rahimah. The car was driven by its owner. The appellant did not follow. The deceased died at the hospital soon after she was admitted.

D In the petition of appeal, the appellant listed seven grounds why the appeal should be allowed. The first two grounds were in respect of the evidence of SP9, a child witness. Learned counsel for the appellant, Mr Siew Kuan Onn, dealt with these two grounds simultaneously. In his submission, counsel for the appellant submitted that there was a E misdirection by the learned trial judge in respect of the child's evidence. He said that there was no warning by the learned judge to the jury of the risk of a conviction based on a child's evidence. The complaint was that the learned judge did not mention the risk in his summing-up to the jury. Counsel for the appellant referred to para 35 of the summing-up.

F The second ground of complaint was on the corroborative evidence of SP9. Counsel for the appellant conceded that the learned trial judge, in his summing-up, had directed the jury correctly when he said there was no direct corroborative evidence in respect of SP9's evidence, and as such, one has to look into the circumstantial evidence. The complaint of the appellant was that when the trial judge made the direction, he pointed out the G circumstantial evidence of four witnesses which he said were corroborative evidence of SP9. It was submitted by learned counsel for the appellant that the cumulative effect of evidence of the four witnesses were not sufficient for corroboration. The four witnesses were Dr Thanaletchemy a/p N Nagalingam ('SP7') who did the post-mortem on the deceased, the investigating officer ('SP13') who seized the sickle ('exh P6A'), the mother H of the deceased ('SP10') and Arumugam a/l Palaniandy ('SP11'). It was the contention of counsel for the appellant that since the evidence of these four witnesses were not sufficient to corroborate the evidence of SP9, the learned judge should give another warning of the risk of accepting SP9's evidence. He went on to say that the prosecution failed to establish the murder weapon which were stated to be exh P6A and exh P8A. There was no I fingerprint or blood stain found on both exhibits. As such, there was no direct evidence of these exhibits to show that they were the murder

weapons. Learned counsel cited the case of *Lejzor Teper v R* [1952] AC 480 where at p 489, Lord Normand who delivered the judgment of the House of Lords said:

> ... It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

Counsel for the appellant further stated that in addition to the sickle, there was another weapon being used, which was the mop. The mop cannot cause the serious injuries on the head and neck or the injuries on the pelvic region as described by SP7, the medical officer who conducted the post-mortem.

In his submission, learned counsel conceded on the injuries found on the deceased were as described by SP11. The concession is only to the injuries alone and not to how they were caused or who or what caused them. For that, it was contended that there was no corroboration on the evidence of SP9. As to the evidence of SP10, it was submitted by counsel for the appellant that she found the deceased in serious condition and the deceased asked for water. SP10's evidence did not corroborate the evidence of SP9. As to the evidence of SP13 (the investigating officer), his evidence was only in respect of the discovery of weapons. They were not corroborative of SP9's evidence. In view of this, it was submitted by learned counsel for the appellant that the learned judge should have warned the jury of the risks. His failure to do so tantamount to a misdirection.

The learned DPP (En Abang Iskandar) in his reply submitted that there is no set formula on how a warning should be given by a trial judge to a jury concerning the corroborative evidence of child's evidence. We agree with the learned DPP and in this respect, we would like to refer to the case of *Tham Kai Yau & Ors v PP* [1977] 1 MLJ 174 which is a Federal Court decision. Raja Azlan Shah FJ (as he was then), delivering the judgment of the court, at p 175 said:

> The appeal was brought on several grounds. We did not intend to deal with all of them as we felt there was not much substance in them. We needed to consider only two. One of them was that the jury were not given due warning against accepting the evidence of PW8 who was 13 years of age at the time of the incident and 14 when he gave evidence, without corroboration. *In cases involving child evidence of tender years, we are of the opinion that it would not be necessary to give a formal warning that it is dangerous to convict on the uncorroborated evidence of a child of tender years. It is sufficient if the judge adopts the prudent course of advising the jury to pay particular attention to or to scrutinize with special care, the evidence of young children and explains the tendencies of children to invent and distort.* The objection in such a case as this, is not on the grounds of complicity, as in the case of an accomplice, or on the grounds of an oath against an oath, as in the case of a prosecutrix in a sexual offence against her, but on the ground of tendency of a child of tender years to confuse fantasy with reality: see *Loo Chuan Huat v PP* [1971] 2 MLJ 167.
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> In the present case, however, the learned judge did not consider PW8 a child of tender years and he was satisfied that he possessed sufficient intelligence to understand the meaning and significance of an oath. The

absence of such warning therefore was not fatal as there was in fact substantial corroboration of the boy's evidence. The appeal on this ground, we thought, must therefore fail. (Emphasis added.)

We have examined the summing-up by the learned trial judge to the jury and we are satisfied that he had addressed the jury adequately according to the principles laid out in the above case. For that purpose, we feel that it is necessary for us to refer to certain passages in his summing-up to show that he had given adequate warning to the jury. At p 19 of his summing-up, the learned judge said:

> Tuan-tuan telah melihat SP9 semasa memberi keterangan. Semasa memberi keterangan, beliau berumur 12 tahun dan semasa kejadian, beliau berumur sembilan tahun. Apabila dipanggil untuk memberi keterangan, saya telah memutuskan bahawa beliau tidak faham pengertian sumpah, tetapi mempunyai cukup kepandaian dan faham kewajipan supaya bercakap benar. Oleh itu, keterangan beliau dalam mahkamah ini adalah secara tidak bersumpah. Beliau hanya telah saya terangkan akan kehendak untuk beliau bercakap benar. Dari segi undang-undang, keterangan SP9 tergolong sebagai keterangan saksi kanak-kanak.
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> [Its translation:
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> Gentlemen, you have observed SP9 while she gave evidence. She gave evidence when she was 12 years old while the incident occured when she was nine years old. When called upon to give evidence, I have decided that she did not understand the nature of oath but is capable of understanding the duty to tell the truth. Therefore, her evidence in this court is administered without oath. I have explained to her the duty in telling the truth. According to law, the evidence of SP9 is categorized as evidence of a child of tender years.]

At para 35, the learned judge said:

> Pada pendapat saya, itulah sahaja keterangan pihak pendakwa untuk mengaitkan tertuduh dengan pembunuhan Jayalakiam a/p Palaniandy. Keterangan kes pendakwa bergantung kepada penerimaan keterangan SP9. Tuan-tuan dan puan-puan telah melihat SP9 di kandang saksi semasa memberi keterangan. Saya percaya tuan-tuan dan puan-puan telah memerhatikan tingkahlakunya dan cara mana beliau menjawab soalan-soalan yang dikemukakan kepadanya. Tuan-tuan dan puan-puan perlu membuat keputusan sama ada keterangan itu adalah benar atau suatu rekaan dan sebagaimana yang tuan-tuan dan puan-puan sedia maklum bahawa kanak-kanak kadangkala mendapati susah untuk membezakan 'reality' dengan 'fantasy'. Mereka mendapati sukar oleh kerana lampauan masa untuk membezakan keterangan yang diperolehi dari imaginasi. Terpulanglah kepada tuan-tuan dan puan-puan memutuskan dalam kes ini sama ada keterangan SP9 adalah direka dan datang dari imaginasi atau fantasi beliau atau keterangan beliau adalah dari pengamatan beliau dari apa yang sebenarnya beliau lihat.
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> [Its translation in English:
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> In my opinion, those are the only evidence of the prosecution which connects the accused to the murder of Jayalakiam a/p Palaniandy. The evidence of the prosecution depends on the admissibility of SP9's evidence. Ladies and gentlemen, you have seen SP9 in the witness box while she gave evidence. I believe you have observed the demeanour and the manner in how she

answered the questions that were forwarded to her. You ladies and gentlemen have to determine whether the evidence given is true or fiction as you are aware that children sometimes find difficulty in distinguishing between reality and fantasy. The lapse of time made them difficult in distinguishing evidence as to imagination. It is up to you ladies and gentlemen to decide in this case whether the evidence of SP9 was concocted and derived from her own imagination or fantasy or that her evidence was based on her own observations from what she actually witnessed.]

From the above passages, it is clear to us that the learned trial judge had warned the jury of the risks of accepting a child's evidence. He told the jury that at the time when SP9 saw the incident, she was nine years of age and at the time of giving evidence she was 12 years old. He told the jury that the oath was not administered on SP9 when she gave evidence. She was only told to tell the truth. Further, the learned trial judge warned the jury that they have to evaluate and scrutinize the evidence when it was not given under oath. The jury was also warned that a child may find difficulty in differentiating between 'fantasy' and 'reality' and also between 'imagination' and 'what actually was seen'. It is clear to us that the learned judge had given ample warning of the risks in accepting a child's evidence and we believe we could not do more than that.

Turning to corroboration of a child's evidence, the learned trial judge in his summing-up at para 20 onwards said:

20 Keterangan saksi kanak-kanak

Menurut s 133A Akta Keterangan 1950, keterangan kanak-kanak seperti SP9 tidak boleh menyabitkan tertuduh atas tuduhan yang dikenakan melainkan keterangannya adalah disokong (corroborated) oleh keterangan-keterangan lain yang mengaitkan tertuduh dengan kesalahan yang dilakukan. Keterangan sokongan yang dimaksudkan ialah keterangan lain yang menyokong keterangan SP9. Keterangan sokongan itu hendaklah mengaitkan tertuduh, yang mengesahkan perkara-perkara penting bahawa bukan sahaja kesalahan telah berlaku, tetapi dilakukan oleh tertuduh. Menurut prinsip undang-undang keterangan, sokongan itu mesti datang dari sumber yang bebas (independent sources) tetapi tidak semestinya melalui keterangan secara langsung (direct evidence). Ia adalah mencukupi jika keterangan sokongan itu datang dari keterangan mengikut keadaan (circumstantial evidence) yang mengaitkan tertuduh dengan kesalahan yang dilakukan. Namun begitu, keterangan sokongan hanya dikehendaki untuk menyokong kepada perkara-perkara yang penting (material particulars) dan adalah tidak perlu untuk tiap-tiap perkara yang dikatakan oleh saksi kanak-kanak seperti SP9 perlu disokong dengan keterangan bebas yang lain.

21 Oleh itu, seperti yang dijelaskan tadi bahawa keterangan SP9 tidak boleh diterima sebagai keterangan jika tidak ada keterangan sokongan yang bebas. Ini bermakna, tuan-tuan tidak boleh mendapati tertuduh bersalah hanya dengan berpandukan kepada keterangan SP9.

22 Untuk membolehkan tuan-tuan dan puan-puan membuat keputusan sama ada terdapat keterangan sokongan terhadap keterangan SP9, maka perlulah tuan-tuan dan puan-puan melihat keterangan saksi-saksi lain yang memberi keterangan dalam kes ini. Sebagaimana yang tuan-tuan dan puan-puan telah ketahui sekarang, bahawa tidak ada saksi lain selain

dari SP9 yang melihat kejadian yang malang ini. Oleh itu, sudah tentu tidak ada keterangan sokongan secara 'direct evidence' terhadap keterangan SP9. Tetapi, sebagaimana yang saya katakan pada awal tadi, keterangan sokongan terhadap keterangan SP9 boleh diperolehi melalui keterangan ikut keadaan (circumstantial evidence). 'Circumstantial evidence' bermaksud keterangan yang bukan keterangan langsung yang dapat dilihat dengan mata sendiri, akan tetapi keterangan-keterangan secara tidak langsung yang jika dicantumkan kesemuanya akan memberi kesan kumalatif bahawa hanya satu kesimpulan yang tidak dapat dielakkan bahawa sesuatu fakta itu memang berlaku.

[Its translation in English:

20 Evidence of child witness

Pursuant to s 133A of the Evidence Act 1950, evidence of a child witness like SP9 cannot convict the accused on the charges preferred against him unless her evidence is corroborated by other evidence linking the accused with the offence that was committed. The corroborated evidence meant that there are other evidence which supports SP9's evidence. The corroborated evidence must link the accused which confirms salient and important facts that not only an offence has been committed but it was committed by the accused. According to the law of evidence, the corroborated evidence should be derived from independent sources but not necessarily through direct evidence. It is sufficient if the corroborated evidence from circumstantial evidence connects the accused with the offence that was committed. However, the corroborated evidence is only required to support the material particulars and not every particular conveyed by a child witness like SP9 must be supported by other independent evidence.

21 Hence, as explained earlier, the evidence of SP9 is inadmissible if not supported by independent corroboration. This means that you gentlemen of the jury cannot convict the accused by solely depending on the evidence of SP9.

22 In order for you to decide whether there is supporting evidence of the evidence of SP9, it is necessary for you ladies and gentlemen to consider the evidence of other witnesses who had testified in this case. As you are aware, there were no other witnesses besides SP9, who witnessed the unfortunate incident. As such, there is no direct evidence supporting the evidence of SP9. But as I have mentioned earlier, the supporting evidence of the evidence of SP9 may be derived by way of circumstantial evidence. Circumstantial evidence means evidence which are not direct evidence witnessed by oneself but indirect evidence which when combined together will result in a cumulative effect that there is only one irresistible conclusion that the fact actually happened.]

The gist of the above passages is that the learned judge made it clear to the jury that an accused person cannot be convicted on the uncorroborated evidence of a child witness. He went on to explain to the jury that corroboration did not necessarily come from the evidence of another eyewitness. It could also come, where there were no other eyewitnesses as in the present case, from 'circumstantial evidence' of other witnesses. The circumstantial evidence must be of such a nature that it would lead to an irresistible conclusion that the facts did happen.

What is meant by 'corroboration'? Sharma J in the case of *Attan bin Abdul Gani v PP* [1970] 2 MLJ 143 laid out the law on corroboration clearly. At p 146, Sharma J said:

> The law as to corroboration as enunciated by the various authorities may be summarized thus:
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> 'It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent, the rules are clear:
>
> (1) It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.
>
> (2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime.
>
> (3) The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another.
>
> (4) The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime.
>
> (5) Corroboration must be in material particulars but it is not necessary that the whole prosecution story or all material particulars should be corroborated.
>
> (6) Corroborative evidence required for accepting the testimony of an accomplice need not by itself conclusively establish the guilt of the accused. It is sufficient if it is a piece of circumstantial evidence which tends to connect the accused with the crime with which he is charged.
>
> (7) Though a trap-witness is not an approver, he is certainly an interested witness in the sense that he is interested to see that the trap laid by him succeeded. He could at least be equated with a partisan witness and it would not be admissible to rely upon his evidence without corroboration. His evidence is not a tainted one; it would only make a difference in the degree of corroboration required rather than the necessity for it.
>
> (8) Corroboration evidence need not be by direct evidence. It may be by circumstantial evidence in which case the rule relating to proof from circumstantial evidence would apply and the circumstance must be consistent with the innocence of the accused against whom the circumstance if offered as evidence.

(9) There must be corroboration in one or more material particulars but that does not mean in every particular or detail. Corroboration, as the grammatical meaning of the word itself implies, means only support, or in other words, an assurance of truth which is lent to the evidence of the accomplice or the complainant by other evidence. It does not mean that the whole evidence given by the accomplice (or complainant) must be repeated wholly or in parts by witnesses other than the accomplice (or the complainant).

(10) The minimum corroboration which the law ordinarily requires of the evidence of an accomplice is evidence of at least one material fact pointing to the guilt of the accused person. The weight of such corroborative evidence which is necessary, depends on the particular facts and circumstances of the case.'

In the case of *Yap Ee Kong & Anor v PP* [1981] 1 MLJ 144, Raja Azlan Shah CJ (Malaya), as he was then, delivering the judgment of the Federal Court at p 146 said:

> ... Therefore, the nature and extent of corroboration is relevant. The rules are lucidly expounded by Lord Reading in *Baskerville*'s case, [1916] 2 KB 658. The rules may be formulated as follows:
>
> (1) There should be some independent confirmation tending to connect the accused with the offence although it is not necessary that there should be independent confirmation of every material circumstance;
>
> (2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice; and
>
> (3) The corroboration must come from independent sources, thus bringing out the rule that ordinarily the testimony of an accomplice would not be sufficient to corroborate that of another.

We have gone through the summing-up by the learned trial judge on corroboration (in the above passages) and we found that he had adequately warned the jury of the risks of uncorroborated evidence of a child and set out the rules on corroboration to the jury correctly. The learned judge then went on the evidence of various witnesses where he was of the opinion that they were of corroborative nature. For the purpose of corroboration, the learned judge set out in details the evidence of SP7, SP10, SP11 and SP13 and pointed out the corroborative evidence of these witnesses on the testimony of SP9. We feel that there is no necessity to repeat them. At the end of it, at para 36 of his submission, the learned trial judge again warned the jury whether the corroborative evidence pointed by him was tantamount to corroboration or not was for the jury to decide. This was what the learned judge said in para 36:

> Terpulanglah kepada tuan-tuan dan puan-puan untuk memutuskan sama ada keterangan-keterangan yang saya huraikan adalah menyokong keterangan SP9. Keterangan-keterangan tersebut adalah keterangan mengikut keadaan (circumstantial evidence). Tuan-tuan dan puan-puan hendaklah

memutuskan sama ada keterangan-keterangan tersebut diambil secara bersama dan bersekali menyokong keterangan SP9 mengenai perkara-perkara penting (material particulars) dan seterusnya membolehkan tuan-tuan dan puan-puan membuat keputusan tanpa keraguan yang munasabah bahawa tertuduhlah yang melakukan kecederaan-kecederaan yang dialami oleh si mati.

[Its translation in English:

Therefore, it is up to you to decide whether the evidence which I have elaborated supports the evidence of SP9. Those evidence are circumstantial evidence. You must decide whether those evidence taken together and in totality support the evidence of SP9 in relation to the material particulars thereby enabling you to decide without reasonable doubt that it was the accused who inflicted the injuries suffered by the deceased.]

We found that the summing-up by the learned judge was fair and in accordance with the evidence adduced. The learned judge also gave ample warning of the risks of accepting the evidence.

Learned counsel for the appellant submitted that there was insufficient evidence to corroborate the evidence of SP9 and without corroboration, the evidence of SP9 could not stand. As we have stated above, the learned judge had laid out the corroborative evidence by the various witnesses. In his summing-up, the learned judge pointed out that SP7 gave evidence of three incise wounds on the head and neck. SP7 stated that these wounds were caused by a sharp instrument. The learned judge pointed out this evidence more or less corroborate the evidence of SP9 who said that she saw the appellant slash the deceased on the head with a sickle. SP7 also gave evidence that there were other jagged wounds on the lip and bruises from the shoulder to the knee of the deceased which could be caused by a blunt instrument or by force of hands and legs. According to the learned judge, these again corroborate the evidence of SP9 that she saw the appellant using a mop to hit the deceased after the deceased fell down. According to the learned judge, SP10 corroborated the evidence of SP9 in that SP9, her brother and her sister went to SP10's house and brought SP10 to the deceased's house. On seeing the condition of the deceased, SP10 asked SP9 and her brother to call SP11. As to the evidence of SP13, the learned judge was of the opinion that he corroborated the evidence of SP9 as to the weapons used. He also corroborated the evidence that there were holes in the wall of the house where the hall and railway tracks could be seen.

We have gone through the evidence and we agreed with the learned judge that there was sufficient corroboration of SP9's evidence on material particulars which he stated in his summing-up. We found that the summing-up by the trial judge in respect of the corroboration was fair and in accordance with the evidence. The learned judge also warned the jury of the risks in evaluating these corroborative evidence. It is only for them to decide from what they had seen and heard from the witnesses and not to be influenced by what he had said.

Counsel for the appellant also submitted there was a misdirection by the trial judge when he failed to direct the jury on the lesser charge of

culpable homicide under s 304 of the Code. The answer to this is found in the case of *Juraimi bin Husin v PP* [1998] 1 MLJ 537 where at p 571, Gopal Sri Ram JCA, delivering the judgment of the court, said:

> Now, the question whether a judge ought to direct the jury on the possibility of an alternate verdict under s 304 depends upon the nature of the evidence in a particular case. If there is, in a given case, some evidence, however weak, that would bring into operation one or more of the exceptions to murder, the judge is duty bound to leave it to the jury with an appropriate direction on the point. Absent such evidence, a judge is under no duty to direct the jury upon the issue. As Syed Agil Barakbah SCJ said in *Teoh Seng Lian v PP* [1986] 1 MLJ 474 at pp 475–476:
>
> > 'Now, it is the general principle of law for a judge sitting with a jury to put to them any defence available on the evidence irrespective of whether or not reliance has been placed on that defence at the trial or whether or not it has been mentioned by the counsel at the trial. The way in which it is to be complied with is a matter for the trial judge to decide basing on the actual evidence adduced at the trial (see *Loo Geok Hong v PP* [1961] MLJ 157). *By available defence it does not mean each and every defence that is mentioned in the Penal Code but possible defences arising from the evidence that become necessary in the circumstances to be put to the jury in order to enable them to reach a proper and just verdict.*' (Emphasis added.)
>
> In the present instance, there is no evidence whatsoever to suggest the availability of any of the exceptions appearing under s 300 of the Penal Code. It follows that there was no duty whatsoever on the learned judge to include in his charge to the jury a direction upon the point.

In the present appeal, the evidence led by the prosecution was under s 300 of the Code and no other. The appellant's defence was one of denial. He denied that he caused the injuries on the deceased. No other defence was put up. There was no evidence of any of the exceptions in s 300 of the Code. As such, there was no duty on the part of the learned trial judge to sum up to the jury in respect of a lesser charge since the evidence adduced in the appeal was either murder or none at all. The appellant did not put the defence of being drunk. The appellant gave evidence that he took some drinks on the night of the incident but there was no claim by him that he was drunk. He stated in his evidence that after dinner he took some drinks and at about 10pm he went to sleep. At about 3am, he was awakened by his children who informed him that the deceased was on the rail tracks. He went and carried her to the house and there he saw the injuries on the deceased. As such, there was no suggestion that at the time of the incident, he was drunk. His defence was one of total denial. In his submission, counsel for the appellant in the High Court (En Redzuan) did not touch at all on the defence of being drunk. He dwelt entirely on the defence of denial. Thus, the failure on the part of the trial judge to address the issue of a lesser offence or that the exceptions to s 300 applied was not a misdirection because no such defence or evidence was made available or suggested.

The last issue raised by the appellant was the burden of proof on the prosecution. It was submitted that the trial judge had erred when at the end of the prosecution case, he found that there was a prima facie case against

the appellant and if unrebutted would warrant his conviction. As such, there was a misdirection by the trial judge. We have gone through the evidence adduced by the prosecution and there is no doubt in our mind, there is ample evidence to show that at the end of the prosecution case, the prosecution had proved its case beyond reasonable doubt. The choice of the words 'prima facie' is only the wrong usage of words. When he said that there was prima facie case against the appellant that if unrebutted would render a conviction, he meant them to be that the prosecution had proved its case beyond reasonable doubt.

For the above reasons, we find that there is no merit in the appeal by the appellant. We therefore dismissed the appeal and confirm the conviction and the sentence passed by the court below.

Appeal dismissed. Conviction and sentence confirmed.

Reported by David Lai